APPENDIX A

[Filed Oct. 18, 1994]

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 21,551

BLAZE CONSTRUCTION CO., INC.,
an Oregon corporation,
Plaintiff-Respondent,

vs.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Defendant-Petitioner,

Consolidated With:

No. 22,132

ARCO MATERIALS, INC.,
Petitioner-Respondent,

vs.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Respondent-Petitioner,

Original Proceeding on Certiorari

OPINION

BACA, Chief Justice.

This proceeding arises from two consolidated cases decided in the Court of Appeals, *Blaze Construction Co. v. New Mexico Taxation and Revenue Department*, —— N.M. ——, 871 P.2d 1368 (Ct. App.), *cert. granted*, —— N.M. ——, —— P.2d —— (1993), and a third case in the same Court, *Arco Materials, Inc. v. New Mexico Taxation and Revenue Department*, —— N.M. ——, —— P.2d —— [No. 14,729, filed April 27, 1994], *cert. granted*, —— N.M. ——, —— P.2d —— (1994). We granted certiorari in these cases and consolidated them to consider whether federal law preempts imposition of New Mexico gross receipts tax on a contractor's receipts when the contractor enters into an agreement with the Bureau of Indian Affairs ("the BIA") to construct or provide materials for roads built on several New Mexico Indian reservations. In each case the Court of Appeals held that the gross receipts tax could not be imposed. We reverse the Court's decisions and hold that federal law did not preempt imposition of the tax.

I.

The following facts are pertinent to this proceeding. In *Blaze*, Blaze Construction Company ("Blaze"), an Oregon corporation whose owner is a member of the Blackfeet tribe in Oregon, contracted with the BIA to build roads on several New Mexico Indian reservations.[1] The roads were to be built pursuant to the Federal Lands Highways Program, 23 U.S.C. § 204 (1988).[2] Each tribe helped plan the route the roads would traverse across

[1] The contract called for roads to be built on the Jicarilla Apache Reservation, the Navajo Reservation, the Laguna Pueblo, and the Zia Pueblo.

[2] The Federal Lands Highways Program provides federal funding to construct and improve Indian reservation roads. 23 U.S.C. § 204(b).

tribal land and also provided water and some materials for the construction. Blaze was required to hire local reservation residents to work on the road construction.

In April 1986 Blaze requested a ruling from the New Mexico Taxation and Revenue Department ("the Department") on whether the construction projects were taxable. The Department issued a letter ruling in May 1986, informing Blaze that the projects were subject to the tax. Blaze did not contest this ruling but declined to pay the tax. In February 1988 the Department assessed Blaze gross receipts tax in the amount of $222,401, plus penalty and interest amounting to $68,500.

In March 1988 Blaze filed an administrative appeal from the Department's assessment. The Department held a hearing in October 1989 and in January 1990 issued a final decision upholding he validity of the assessment. Blaze appealed this decision to the Court of Appeals.

The Court of Appeals filed an opinion in September 1993, reversing the Department's ruling. The Court rejected the Department's argument that Blaze was a federal government contractor subject to state taxes under *United States v. New Mexico,* 455 U.S. 720 (1982). The Court applied the Indian preemption doctrine and held that the state taxes in question were preempted with respect to construction of roads on tribal land. *See* —— N.M. at ——, 871 P.2d at 1373.

The Court of Appeals addressed the same issue in *Arco.* In that case, Arco Materials, Incorporated ("Arco"), sold paving materials to the BIA for road construction on Navajo lands. The Department assessed gross receipts tax and penalties, and disallowed certain deductions. Arco challenged the assessment of the taxes and penalties and the disallowance of deductions by appealing to the Court of Appeals. Relying on its opinion in *Blaze,* the Court of Appeals reversed the disallowance of deductions and the assessment of penalties. We granted certiorari in

both cases and consolidated them because they presented identical issues.

II.

On appeal, we address whether federal law preempts the imposition of New Mexico gross receipts tax on contractors' receipts when the contractors have entered into agreements with the BIA to either construct or provide materials for roads built on Indian land. The *Blaze* case presents a threshold issue of whether Blaze, an Indian-owned corporation performing work solely on an Indian reservation, is per se exempt from state taxation. We conclude that Blaze is not automatically exempt from state taxation. In *Washington v. Confederated Tribes,* 447 U.S. 134, 160-61 (1980), the United States Supreme Court upheld a state's power to levy taxes on Indians who lived on a reservation but had no tribal affiliation with the particular reservation Indians among whom they lived:

> [T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act . . . does not demonstrate a congressional intent to exempt such Indians from State taxation. . . .
>
> Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation . . . We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

447 U.S. at 161.

In this case, Blaze is owned by a member of the Blackfeet tribe. The road construction is taking place on Indian reservations other than the Blackfeet reservation.

Under *Washington,* Blaze is not per se exempt from paying taxes for the road construction.

We note that two opinions of our Court of Appeals have been read to stand for the proposition that "tribal affiliation is of no moment when determining the taxability by states of an Indian on a reservation." *Fox v. Bureau of Revenue,* 87 N.M. 261, 263, 531 P.2d 1234, 1236 (Ct. App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975), *cert. denied,* 424 U.S. 933 (1976), *overruled by New Mexico Taxation and Revenue Department v. Greaves,* 116 N.M. 508, 864 P.2d 324 (Ct. App. 1993); *see also Eastern Navajo Indus., Inc. v. Bureau of Revenue,* 89 N.M. 369, 373-74, 552 P.2d 805, 809-10 (Ct. App.) (suggesting that similar rule applies in corporate context), *cert. denied,* 90 N.M. 7, 558 P.2d 619 (1976), *cert. denied,* 430 U.S. 959 (1977). Both *Fox* and *Eastern Navajo* were decided prior to *Washington,* and we disapprove any language in these cases to the extent that it can be read as inconsistent with our holding today.

A.

We next address whether the Court of Appeals erred by deciding that the Indian preemption doctrine applied in *Blaze* and in *Arco.* Citing *United States v. New Mexico,* the Department argues that the state may tax entities that contract with the federal government. The Department asserts that Blaze and Arco contracted with the federal government by contracting with the BIA and are thus liable to pay state taxes without the necessity of applying the Indian preemption doctrine to determine whether the tax is preempted.

The Court of Appeals disagreed with the Department's argument and concluded that the BIA is "a partner in the tribes' performance of the integral governmental functions of improving the transportation system and facilitating economic development." —— N.M. at ——, 871 P.2d at 1370. The Court of Appeals held that "[u]nder these circumstances . . . the fact that Blaze's contracts

. . . were with the BIA, rather than the tribes, has no effect on the necessity for performing [Indian] preemption analysis." —— N.M. ——, 871 P.2d 1370-71. We disagree with this holding and conclude that the Indian preemption doctrine is not applicable to the facts of these cases.

As the Department correctly points out, the U.S. Supreme Court has only applied the Indian preemption doctrine in cases where contracts were made or business was conducted directly with Indian tribes or tribal members. *See Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 166 (1989) (applying doctrine where state imposed severance taxes on production of oil and gas on reservation land); *Ramah Navajo Sch. Bd. v. Bureau of Revenue,* 458 U.S. 832, 834 (1982) (applying doctrine where state imposed gross receipts tax on receipts that non-Indian construction company, hired to build reservation school, received from tribal school board); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 137-38 (1980) (applying doctrine where state attempted to impose motor carrier license and use fuel taxes to company engaged in commerce on Indian reservation); *Central Mach. Co. v. Arizona Tax Comm'n,* 448 U.S. 160, 161 (1980) (applying doctrine where state taxed sale of farm machinery to Indian tribe); *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 165 (1973) (applying doctrine where state imposed personal income tax on reservation Indians who derive entire income from reservation sources); *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 685-86 (1965) (applying doctrine where retail trading post was doing business with Indians on Navajo Reservation). In the cases at bar, Blaze and Arco contracted directly with the BIA, an agency of the federal government, rather than with an Indian tribe or with individual tribal members. Because Blaze and Arco contracted with a federal government agency rather than with Indian tribes or tribal members, the Indian preemption doctrine is inapplicable, and Blaze

and Arco are subject to state taxes, just as any other federal government contractor would be.[3] *See New Mexico,* 455 U.S. at 735 & 741.

In *Blaze,* the Court decided that *United States v. New Mexico* did not apply. In so holding, the Court of Appeals conceded that the BIA was a federal agency. Nonetheless, the Court decided that it was necessary to apply Indian preemption analysis because the agency "ha[d] a special relationship with the Indian tribes" and, in essence, was "a partner in the tribes' performance of . . . integral governmental functions" such as road building. — N.M. at —, 871 P.2d at 1370. We are unpersuaded by this rationale. The BIA is not a partner or agent of an Indian tribe for the purpose of entering into agreements with contractors to construct roads on Indian land. To equate Indian tribes and the BIA in this way ignores the fact that tribal governments have retained an element of sovereignty separate and distinct from the federal government. *See Bracker,* 448 U.S. at 142 (recognizing that while Indian tribes do not recognize full attributes of sovereignty, they nonetheless have power to govern their own internal and social relations); Felix S. Cohen et al., *Handbook of Federal Indian Law* 232 (Rennard Strickland & Charles F. Wilkinson eds., 1982) (noting that Indian tribes have consistently been recognized as separate

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[3] The *New Mexico* case held

> [T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities . . . . This view, we believe, comports with the principal purpose of the immunity doctrine, that of forestalling "clashing sovereignty," by preventing the States from laying demands directly on the Federal Government.
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> . . . .
>
> . . . [Consequently,] [a]llowing the States to apply use taxes to [entities contracting with the federal government] does not offend the notion of federal supremacy.

455 U.S. at 735 & 741 (citations omitted).

independent political communities that "'exercise powers of self government"). While the BIA acts in an administrative capacity on the tribe's behalf, it is not synonymous with the tribe; it exercises federal, rather than tribal, authority when entering into contracts for road construction on tribal land. We hold that Court of Appeals erred in concluding that the BIA acted as a tribal partner when contracting for the construction of the roads and in applying the Indian preemption doctrine to the instant cases.

B.

Although we hold that the Court of Appeals erred in deciding that application of the doctrine was necessary, we address whether the Court misapplied the doctrine. The Department argues that the Court of Appeals erred because it relied on the "balancing of interests" approach from *Bracker* and *Ramah* rather than on the "legislative intent" approach in *Cotton Petroleum* that allegedly replaced the "balancing of interests" approach. We do not agree with the Department that *Cotton Petroleum* supplanted *Bracker* and *Ramah* with a new test, although we do believe that *Cotton Petroleum* modified the *Bracker/Ramah* test.

To understand the current Indian preemption test, it is helpful to examine the doctrine. The historical development of the Indian preemption doctrine began to take shape in 1965, when, in *Warren,* the Court addressed whether the State of Arizona could levy a 2 percent tax on the gross proceeds of sales or gross income of a retail trading business operating on the Navajo Indian Reservation in Arizona. 380 U.S. at 685-86. In holding that the tax could not be imposed, the Court relied on the pervasive effect that federal legislation and regulations had over Indian trading:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in

> hand that no room remains for state laws imposing additional burdens upon traders. . . .
>
> And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Id. at 690-91. Thus, in its early stages the Indian preemption doctrine relied on the pervasiveness of federal statutes and regulations when determining whether a state tax was preempted.

The doctrine evolved further in 1973, when the Court decided *McClanahan.* In that case, the State of Arizone tried to impose a personal income tax on Indians who derived their entire incomes from reservation activities. 411 U.S. at 165. Consistent with *Warren,* the Court held the tax invalid because it "interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves." *Id.* The Court considered the historical notion of Indian sovereignty, stating that " '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history,' " *id.* at 168 (quoting *Rice v. Olson,* 324 U.S. 786, 789 (1945)), "[and] provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172.

The Court developed the doctrine further in *Bracker* and *Ramah.* In *Bracker,* the Court noted that "congressional authority and the 'semi-independent position' of Indian tribes have given two independently related barriers to the assertion of state regulatory authority over tribal reservations and members," 448 U.S. at 142. State regulatory authority "may be pre-empted by federal law" or by " 'the right of reservation Indians to make their own laws and be ruled by them.' " *Id.* (quoting *Williams v. Lee,* 358 U.S. 217, 220 (1959)). The Court articulated a three-part "balancing of interests" test, stating that

the determination of whether an exercise of state authority was preempted "called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 145. *Ramah* reaffirmed the principles articulated in *Bracker* and, applying those principles, held preempted a state gross receipts tax on the revenue a non-Indian construction company received for the construction of a school on a reservation. 458 U.S. at 834.

In *Cotton Petroleum*, the case that the Department claims changed the test articulated in *Bracker* and *Ramah*, the Court addressed whether the State of New-Mexico could impose severance taxes on the production of oil and gas "by non-Indian lessees of wells located on the Tribe's reservation." 490 U.S. at 166. The Court reviewed the principles of *Bracker* and *Ramah* but held that the tax was not preempted. The Court noted that "[u]nder current doctrine, . . . a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe." *Id.* at 175. The Court gave considerable attention to the legislative history underlying the relevant congressional acts and concluded that "there is . . . simply no history of tribal independence from state taxation of [oil and gas leases] to form a 'backdrop' against which [the legislation] must be read." *Id.* at 182.

After studying the cases giving rise to the Indian preemption doctrine, we disagree with the Department that the United States Supreme Court abandoned the three-part balancing test articulated in earlier cases when it decided *Cotton Petroleum*. The Court applied the balancing test but reached a different result based upon factual distinctions between *Cotton Petroleum* and the earlier cases of *Bracker* and *Ramah*. *See Cotton Petroleum*, 490 U.S. at 183-86. *Cotton Petroleum* did, however, modify the three-part balancing test in certain respects. We hold that the Court of Appeals erred by not

taking into account these modifications in applying the three-part test in *Blaze* and *Arco*.

At the outset, we note that we agree with several points made by the Court of Appeals at the beginning of its discussion of the application of the Indian preemption doctrine. We agree that when "deciding whether state taxation of on-reservation activity has been preempted, we look primarily at congressional intent" and that our nation's history of tribal sovereignty provides a necessary backdrop to the analytical process. —— N.M. at ——, 871 P.2d at 1371 (citing *Cotton Petroleum*, 490 U.S. at 176). The Court of Appeals correctly concluded that although "the Indian Financing Act and other federal statutes evince a federal interest in encouraging tribal self-sufficiency and promoting economic development," this by itself is insufficient for finding preeemption. *Id.* The Court of Appeals concluded that balancing state, federal, and tribal interests was necessary. However, the Court of Appeals erred in applying the "balancing of interests" test.

The Court first erred by holding that the state gross receipts tax was preempted because "the State has identified absolutely no interest in the [road construction] activity." *Id.* As part of the preemption analysis, *Bracker* and *Ramah* both held the state must identify a regulatory function or service performed that would justify the tax. *Ramah* at 458 U.S. at 843-44; *Bracker*, 448 U.S. at 150. Both cases held that the state's general interest in raising revenue through taxes was not sufficient justification for imposing the tax. *Ramah*, 458 U.S. at 845; *Bracker*, 448 U.S. at 150. However, *Cotton Petroluem* abandoned the quid pro quo theory of taxation articulated in *Bracker* and *Ramah*. In *Cotton Petroleum*, the Court rejected the corporation's argument that "tax payments by reservation lessees far exceed[ed] the value of services provided by the State to the lessees." 490 U.S. at 189. The Court noted that "the relevant services provided by the State include those that are available to the lessees

and the members of the Tribe off the reservation as well as on it." *Id.* The Court explained that taxation is primarily used to raise revenue for the common good:

> "[T]here is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity . . . . 'Nothing is more familiar in taxation than the imposition of tax upon a class or upon individuals who enjoy no direct benefit from its expenditure . . . .
>
> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.' "

Id. at 190 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 491, n.21 (1987) (quoting *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 521-23 (1937) (citations and footnote omitted))).

Applying *Cotton Petroleum* to *Blaze* and *Arco,* we conclude that it was irrelevant that the state did not identify specific services or regulatory functions provided in exchange for taxes collected. Taxes are not imposed in exchange for services provided. Instead, taxes are a means of distributing the cost of government among the general population, including its Indian citizens. The state thus had an interest in taxing for the common good —i.e., the welfare of its entire populace, Indian and non-Indian alike. We hold that the interest in raising revenue was sufficient to justify levying the gross receipts tax on Blaze and on Arco. We hold that the Court of Appeals erred by disregarding *Cotton Petroleum* and holding that

state taxes must be directly linked to a state interest in the activity being taxed.

The Court of Appeals also erred by holding that the gross receipts tax was preempted because the tax "indirectly place[d] a burden on the federal and tribal interests in improving the transportation system on reservations and in fostering the economic well-being of tribal members." —— N.M. at ——, 871 P.2d at 1372. The Court reached this conclusion because it found that if contractors were required to pay state taxes for federal road-building projects on an Indian reservation, "the cost per mile of building roads on reservations [would] increase . . . [and] fewer roads or smaller portions of roads [would] be built or improved for the same amount of money." *Id.* The Court also found that the taxes would leave "less money available with which to pay wages to tribal members working on the road projects." *Id.*

We conclude that the Court of Appeals erred by using these facts to justify its conclusion that the state gross receipts tax was preempted. First, the Court's factual findings contradict the findings of the Department, which, after hearing the evidence, found no showing that the tax impaired tribal interests. It is well established that an appellate court will not find facts on appeal. *See Western Bank v. Fluid Assets Dev. Corp.*, 111 N.M. 458, 460, 806 P.2d 1048, 1050 (1991). In this case the Court of Appeals violated this principle by finding "commonsense facts" that directly contradicted the findings of the Department. Second, even were we to assume that the facts found by the Court of Appeals were true, these facts would not justify preemption under *Cotton Petroleum.* In that case the Supreme Court held that indirect, insubstantial, or marginal burdens on tribal interests do not support a claim that a state tax is preempted. 490 U.S. at 186-87. As the Court of Appeals conceded in *Blaze*, any burdens on tribal interests caused by the state

taxation of contractors is indirect, "unlike a situation in which the tribe's own economic activity is being taxed."[4] —— N.M. at ——, 871 P.2d at 1372. Under *Cotton Petroleum*, this indirect burden was insufficient to preempt the state gross receipts tax.

III.

In conclusion, we hold that the Court of Appeals misapplied the Indian preemption doctrine, as modified by *Cotton Petroleum*. We reverse the Court's decision in *Blaze* and reinstate the Department's decision and order assessing taxes, penalties, and interest against Blaze in the total amount of $291,008.53. In addition, we reverse the Court's decision in *Arco* and reinstate the Department's decision disallowing deductions for sales of construction materials to the BIA and assessing penalties for the failure to pay taxes on the sales.

IT IS SO ORDERED.

/s/ Joseph F. Baca
JOSEPH F. BACA
Chief Justice

WE CONCUR:

/s/ Seth D. Montgomery
SETH D. MONTGOMERY
Justice

/s/ Gene E. Franchini
GENE E. FRANCHINI
Justice

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[4] The BIA, rather than the tribes, made the financial contributions to the road projects, and the burden of the taxes thus fell upon the federal government.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Mandate No. 21,551

TO THE Taxation & Revenue Department, GREETINGS:

WHEREAS, in cause styled *In the Matter of the Tax Liability of Blaze Construction Company,* the hearing officer entered a decision and order imposing the New Mexico gross receipts tax on the contractor's receipts pursuant to an agreement with the Bureau of Indian Affairs; and

WHEREAS, the decision and order were afterwards brought by the contractor into the New Mexico Court of Appeals whereupon an opinion was entered on September 2, 1993, reversing the decision and order of the hearing officer; and

WHEREAS, the cause was afterwards brought by the Taxation & Revenue Department into this Court by petition for writ of certiorari, which petition was granted on November 1, 1993, whereupon an opinion was entered on October 18, 1994, reversing the New Mexico Court of Appeals and affirming the decision and order of the hearing officer.

NOW, THEREFORE, this cause is remanded to you for further proceedings, if any, consistent and in conformity with the opinion of this Court.

WITNESS, The Hon. Joseph F. Baca, Chief Justice of the Supreme Court of the

State of New Mexico, and the seal of said Court this 3rd day of November, 1994.

/s/ Kathleen Jo Gibson
KATHLEEN JO GIBSON
Chief Clerk of the
Supreme Court of the
State of New Mexico

(SEAL)

APPENDIX C

[Filed Sep. 2, 1993]

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 12,120

BLAZE CONSTRUCTION CO., INC.,
an Oregon Corporation,
Plaintiff-Appellant,
vs.
THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Defendant-Appellee.

No. 12,119

BLAZE CONSTRUCTION CO., INC.,
an Oregon Corporation,
Plaintiff-Appellant,
vs.
THE TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO, GAIL REESE, Secretary of the Taxation and Revenue Department, and GERALD B. RICHARDSON, Hearing Officer,
Defendants-Appellees.

Appeal from the Taxation and Revenue Department
of the State of New Mexico
GERALD B. RICHARDSON, Hearing Officer

OPINION

CHAVES, Judge.

These cases present the question of whether the State of New Mexico, which played no role in the construction, maintenance, or regulation of certain roads built entirely on Indian reservations, may nevertheless impose gross receipts taxes upon the contractor who built the roads. We need not decide whether the contractor, an Indian entity owned by an Indian who is not a member of the tribes for whom the reservations were set aside, is automatically exempt from state taxation. We hold that the fact that the road construction was funded through the Bureau of Indian Affairs (BIA) and was administered by a contract between the BIA and the contractor, rather than between the tribes and the contractor, does not preclude application of a pre-emption analysis to the taxation question. Applying such an analysis to the facts of this case, we hold that the taxes in question may not be imposed by the State.

FACTS

Blaze Construction Company Inc., (Blaze) is an Indian-owned company, whose owner is a member of the Blackfeet tribe. Blaze contracted with the BIA to build roads on the Jicarilla Reservation, Zia Pueblo, Laguna Pueblo, and Navajo Reservation. The roads were built on rights-of-way provided by each tribe or pueblo (for ease of reference, this opinion subsequently refers to the tribes and pueblos simply as tribes, and to the reservations and pueblos simply as reservations). The tribes were involved in planning the route of each road across tribal land, and provided water and base materials needed for the construction projects. Blaze was required to hire local reservation residents as laborers for each project, and each tribe provided the services of a labor office to give Blaze a pool of workers from which to draw and to monitor compliance with tribal labor laws. Most of Blaze's em-

ployees for each project were Indians residing on the respective reservation upon which the road was being constructed. The State, on the other hand, did not attempt to identify any interest, either in the form of a planning function or regulatory responsibilities, in the construction projects or the roads themselves after they were built. The State did not license Blaze as a construction contractor.

DISCUSSION

Blaze's Exemption from Taxation as an Indian-owned Entity

Blaze contends that, since it is an Indian entity and the projects were performed solely on reservations, it is automatically exempt from state taxation. *See Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 475-81 (1976); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973). Blaze argues that it does not matter that its owner was not a member of any of the tribes upon whose reservations the roads were constructed. The merits of this argument are doubtful. *See Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 161 (1980); *Duro v. Reina,* 495 U.S. 676, 686-87 (1990); *Oklahoma Tax Comm'n v. Sac and Fox Nation,* 113 S. Ct. 1985, 1990 (1993); *but see Fox v. Bureau of Revenue,* 87 N.M. 261, 531 P.2d 1234 (Ct. App. 1975), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975). Because of our disposition of the other issues in this appeal, however, we need not decide this point.

The Effect of BIA, Rather than Tribal, Involvement in the Contracts

The State argues that Blaze contracted with the BIA, not the tribes. Since federal government contractors may be subjected to state taxes, *see United States v. New Mexico,* 455 U.S. 720 (1982), the State maintains that the tax on Blaze's activities was permissible and no pre-

emption analysis need be performed. We disagree. The BIA may be a federal agency, but it is a federal agency that has a special relationship with the Indian tribes involved in this case. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-48 (1980) (describing BIA involvement in tribal business enterprises such as logging). The BIA assists tribes in the performance of governmental functions, in the economic development of their lands, and in their attempts to maintain and enhance tribal sovereignty. In fact, the Supreme Court has specifically stated that for purposes of an Indian preemption analysis, there is no basis for distinguishing between roads maintained by a tribe and roads maintained by the BIA. *Id.* at 148 n.14.

We note also that, in describing and applying the test applicable to pre-emption cases such as this one, the Supreme Court has stated that an analysis of the state, tribal, and federal interests in the activity, not simply the state and tribal interests, is necessary. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). Heavy federal involvement in an activity has been a factor weighing in favor of a finding of preemption, rather than against it. *See Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 831, 840-41 (1982); *Bracker*, 448 U.S. at 146-48. The BIA's role here was to implement and execute road-building projects that improved or provided roads on Indian lands, using Indian labor as much as possible, in cooperation with the tribes involved. That role made the BIA a partner in the tribes' performance of the integral governmental functions of improving the transportation system and facilitating economic development. Under these circumstances, we hold that the fact that Blaze's contracts in this case were with the BIA, rather than the tribes, has no effect on the necessity for performing a pre-emption analysis, and that *United States v. New Mexico* is not applicable to this case.

The Pre-emption Analysis

In deciding whether state taxation of on-reservation activity has been pre-empted, we look primarily at congressional intent. *Cotton Petroleum,* 490 U.S. at 176. However, "the history of tribal sovereignty, serves as a necessary 'backdrop' to that process." *Id.* Pre-emption questions are not resolved by references to standards of pre-emption that have developed in other areas of the law, and are not controlled by rigid conceptions of state or tribal sovereignty. *Id.* Instead, what is required is a "flexible pre-emption analysis sensitive to the particular facts and legislation involved", *id.,* and 'a particularized examination of the relevant state, federal, and tribal interests.' *Id.* In performing such an analysis we must take into account "both the broad policies that underlie the legislation and the history of tribal independence in the field at issue." *Id.* It is also important to note that ambiguities in federal law are ordinarily resolved in favor of tribal independence. *Id.* at 177.

With these principles in mind, we examine the parties' contentions and the facts of this case. Blaze contends that federal legislation and regulations concerning construction of roads on Indian lands are so pervasive that they pre-empt any state intrusion into the process. Blaze directs our attention to the fact that the contracts at issue were let under the Indian Financing Act of 1974, 25 U.S.C. Sections 1451 to 1543 (1988). Blaze also points out that construction of roads such as these is governed by a comprehensive scheme of federal regulations contained in 25 C.F.R. Sections 170.1-170.19 (1992). The BIA is responsible for planning, designing, and constructing roads, and for recomemnding projects to the tribes. Sections 170.3, 170.4a. Tribal decisions concerning road-building priorities are subject to the BIA's approval. Section 170.4a. In addition, the BIA is required to hold public hearings prior to commencement of construction of any new route, and decisions concerning such projects may be appealed by interested parties.

Sections 170.11, 170.19. The BIA is also required to conduct engineering and traffic analyses and determine appropriate speed and weight limits for roads maintained by the BIA. Section 170.8(b).

We agree that the Indian Financing Act and other federal statutes evince a federal interest in encouraging tribal self-sufficiency and promoting economic development. *See Cotton Petroleum*, 490 U.S. at 183 n.14. We also agree that federal regulatory involvement in road construction projects such as these is extensive. However, we understand the holding of *Cotton Petroleum* to be that general policies underlying federal legislation, and even extensive federal regulation concerning an activity, are not by themselves a sufficient basis for a finding of pre-emption. *See id.*; *id.* at 186. We are instead required to perform the particularized factual inquiry into the state, federal, and tribal interests mandated by *Cotton Petroleum*.

Blaze also argues that the Supreme Court, in *Bracker*, has already decided that federal involvement in the use of BIA roads is so all-encompassing that there is no room for application of a state tax. We note, however, that the Court in *Bracker* decided that federal and tribal interests concerning the tribe's logging activities, not the BIA roads themselves, were so strong as to pre-empt state taxation of the activities. *Bracker*, 448 U.S. at 148-49. *Bracker* is not, therefore, dispositive of the question presented by this appeal.

We turn now to the analysis of the relevant state, federal, and tribal interests in the construction activity performed by Blaze. In doing so, we are confronted immediately by the fact that the State has identified absolutely no interest in the activity, either through regulating it or by involvement in the process. The State had no part in planning the construction, played no role in selecting or licensing the contractor, did not regulate any aspect of the construction, and will not maintain the roads or regulate their use. This is, then, a case in which the State "has had nothing to do with the on-

reservation activity, save tax it." *Cotton Petroleum,* 490 U.S. at 186. The federal and tribal control over the projects has left the State with "no duties or responsibilities" concerning the construction. *Id.* at 185. Accordingly, it is extremely difficult for the State to justify the tax imposed on the activity. The lack of any state interest in on-reservation activity has been a crucial factor in decisions disallowing state taxation. *See Ramah,* 458 U.S. at 843; *Bracker,* 448 U.S. at 150; *Gila River Indian Community v. Waddell,* 967 F.2d 1404, 1412 (9th Cir. 1992); *Hoopa Valley Tribe v. Nevins,* 881 F.2d 657, 661 (9th Cir. 1989), *cert. denied,* 494 U.S. 1055 (1990). Where a state has demonstrated a regulatory or other interest in the activity, however, courts have been willing to allow the tax to stand. *See, e.g., Cotton Petroleum,* 490 U.S. at 185-86; *Cabazon Band of Mission Indians v. California,* 788 F. Supp. 1513, 1519-20 (E.D. Cal. 1992).

Given that the applicable analytical framework requires an inquiry into the federal, state, and tribal interests, and given the principle of tribal sovereignty that forms a backdrop for the inquiry, these results make sense. Imposing a burden, in the form of taxation, on activity occurring solely on a tribe's reservation undeniably intrudes to some extent on the tribe's sovereignty. In order to justify such an intrusion, a state should be required to show some interest in the activity sought to be taxed, or the "state's interest" prong of the pre-emption test becomes meaningless. *Cf. Cotton Petroleum,* 490 U.S. at 184 (quoting, with approval, Justice Powell's concurring opinion in *Bracker,* 448 U.S. at 174: " 'The State has no interest in raising revenues from the use of Indian roads that cost it nothing and over which it exercises no control' ").

The State argues that it does not matter that it demonstrated no interest in the construction activity at issue in this case. According to the State, there was insufficient evidence that the taxes imposed on Blaze affected tribal

or federal interests at all. The State rests its argument on the asserted lack of any evidence showing that these particular projects would not have been built if Blaze had included state taxes in its bids. This argument misses the mark. It cannot be contested that, if contractors such as Blaze are required to pay state taxes on their road-building activities, the cost per mile of building roads on reservations will increase. Where the cost per mile is higher, fewer roads or smaller portions of roads can be built or improved for the same amount of money. *See Ramah,* 458 U.S. at 842 (state taxation of contractor depletes funds available for constructing Indian schools). In addition, there is less money available with which to pay wages to tribal members working on the road projects. State taxation, therefore, indirectly places a burden on the federal and tribal interests in improving the transportation system on reservations and in fostering the economic well-being of tribal members.

We rely on these common sense facts in determining that state taxation of projects such as these does interfere with the federal and tribal interests that are inherent in the construction of roads on reservations. *See Cotton Petroleum,* 490 U.S. at 186-87 (stating that it is reasonable to infer, even with a lack of evidence supporting such inference, that state severeance taxes have at least a marginal effect on the demand for on-reservation leases and the value of those leases to the tribe). The amount of money made available by Congress for building such roads is not unlimited; to the extent that state taxes on contractors diminish the amount of money that can be spent on actual construction, the taxes constitute a burden on the federal and tribal interests at stake.

We acknowledge that the burden imposed on such interests by state taxation on the contractors is an indirect one, unlike a situation in which the tribe's own economic activity is being taxed. We also acknowledge that similar indirect burdens were not sufficient to pre-empt the tax

in *Cotton Petroleum*. In the *Cotton Petroleum* case, however, as we have pointed out, the state was able to demonstrate a regulatory interest in the activity being taxed, and that it provided services to the tribe and lessees. *Id.* at 185-86. In this case, the State identified no interest at all in the construction activity. That is a decisive difference between the facts of this case and those in *Cotton Petroleum*. This case concerns roads built entirely on Indian reservations, built entirely with federal funds and under federal supervision, with the cooperation and assistance of the tribes, with labor provided largely by the respective tribes, by a company operating almost exclusively on reservations, and with no involvement by the State whatsoever. Even though the impact on the tribes and federal government in cases such as this is in the form of increased costs rather than direct taxation, given the lack of any State interest in the road construction, that indirect impact is sufficient to disallow the imposition of taxes on projects such as these. *Cf. Hoopa Valley Indian Tribe*, 881 F.2d at 660 n.2 (burden of tax assessed on non-Indian purchasers of tribal lumber held to fall on tribe).

CONCLUSION

Pursuant to the foregoing, we hold that the state taxes in question are pre-empted for the on-reservation activity involved in this case. Construction of roads is an integral governmental function that affects a tribe's economic development as well as the day-to-day lives of its members. Since the State could identify no interest in the construction activity, and the taxes burden federal and tribal interests by increasing the cost of road construction projects on reservations, the applicable pre-emption analysis precludes the State from taxing the activity. We therefore reverse the administrative decision allowing the State to impose the tax on Blaze.

IT IS SO ORDERED.

/s/ Benjamin Anthony Chavez
BENJAMIN ANTHONY CHAVEZ
Judge

WE CONCUR:

/s/ Rudy S. Apodack
RUDY S. APODACK
Judge

/s/ Harris L. Hartz
HARRIS L. HARTZ
Judge

APPENDIX D

BEFORE THE SECRETARY OF THE
TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE TAX LIABILITY OF BLAZE CONSTRUCTION COMPANY, I.D. No. 02-055925-00 9, Protest to Assessment No. 1002028.

DECISION AND ORDER

This matter came on for hearing on October 13, 1989 before Gerald B. Richardson, Hearing Officer. Blaze Construction Company, Inc., hereinafter "Taxpayer" or "Blaze," was represented by Gary Verburg, Esq. The New Mexico Taxation and Revenue Department, hereinafter "Department," was represented by Frank D. Katz, Esq. At the close of the hearing, it was agreed that the parties should brief the issues raised in this matter. Blaze's reply brief was received on December 26, 1989 and the matter was considered submitted for decision on that date. Based upon the evidence and arguments submitted in this matter, IT IS DECIDED AND ORDERED that:

1. On February 18, 1988, the Department issued Assessment No. 1002028 to Blaze Construction Company, Inc. in the amount of $222,409.55 in gross receipts and compensating tax, $22,240.95 in penalty and $46,358.03 in interest, for a total assessment of $291,008.53 for the reporting period of April 1, 1986 through October 1, 1987. The assessment was mailed to the Taxpayer on February 29, 1988 and was timely protested, pursuant to Section 7-1-24 NMSA 1978 on March 28, 1988.

2. The tax assessment at issue was generated based upon road construction activity performed by Blaze under

contracts with the Bureau of Indian Affairs for road construction work. The work was performed on the Jicarilla, Zia, Laguna and Navajo Indian Reservations. Blaze paid no New Mexico taxes upon its construction activities performed under these contracts. The contracts were as follows:

a. The Jicarilla Contract. Blaze was to grade, lay base course and pave a 1.7268 mile long stretch of road on the Jicarilla Reservation. The contract was awarded on May 13, 1986 and the contract amount inclusive of all change orders was $789,437.50.

b. The Laguna Contract. Under this contract, Blaze was to construct .8 of a mile of road, laying curb and gutter, base course and pavement on the Laguna Pueblo. The contract was awarded on May 21, 1986 in the amount of $327.274.

c. The Pinedale Contract. Under this contract, Blaze was to construct 4.3 miles of road at Pinedale on the Navajo Reservation, consisting of base course and paving. The contract was awarded on March 8, 1986 and the contract amount, inclusive of all change orders was $1,264,771.50.

d. The Zia Contract. Blaze was awarded a contract to grade, lay base course and fence a 4.4 mile stretch of road on the Zia Reservation. The contract was awarded on February 10, 1986 and the amount of the contract, including all change orders was $1,241,376.56.

3. Blaze is an Oregon corporation whose sole shareholder is Bill Aubrey. Mr. Aubrey is a Blackfeet Indian, and Blaze qualifies as a 100% Indian-owned entity under the Indian Financing Act of 1974, 25 U.S.C. Section 1451, *et seq*. Blaze's headquarters and Mr. Aubrey's residence are in Yakima, Washington. During the period of time Blaze was performing these contracts in New Mexico, it maintained an office at each contract location. Subsequent to the assessment period at issue, Blaze opened

an office in Albuquerque, located at 1000 Gabaldon Street. Blaze maintains a general manager in New Mexico, Mr. Wood, and also maintains approximately ten full-time employees in New Mexico. These employees are at the supervisor level. Under the terms of the contracts at issue with the Bureau of Indian Affairs, Blaze was required to hire local people (Indians) from each tribe or pueblo upon which the construction project occurred. Besides providing the employment pool for the labor to perform the contracts, the tribes or pueblos provided right-of-way for the roads being constructed, if they were new roads which required new right-of-way, and water and base materials needed for the road construction project. The tribes were also involved in the process of planning the road course through tribal land. In performing these contracts, Blaze was not licensed as a construction contractor by the state of New Mexico. In performing these contracts, Blaze did acquire some materials, such as liquid asphalt, from off the reservation and, additionally, it rented machinery from New Mexico businesses located off reservation. In making these purchases, however, Blaze testified that it did not use nontaxable transaction certificates authorized by Sections 7-9-51 and 7-9-52 NMSA 1978. Rather, Blaze testified that it paid the tax which was included on the invoices from its suppliers for the work on these contracts.

4. In calculating the bids submitted to the Bureau of Indian Affairs for these contracts for which Blaze was the successful bidder, Mr. Wood, who as general manager prepared the bid, testified that upon the instructions of Mr. Aubrey, he did not figure New Mexico gross receipts tax into the amounts submitted as bids. Although the Department informed Blaze, by letter dated May 9, 1986, that it considered these construction contracts to be subject to New Mexico gross receipts tax (Department's Exhibit 1), the evidence indicated that all of the contracts at issue were bid by Blaze prior to receiving the Department's advice.

5. The roads in question were built pursuant to 23 U.S.C. Section 204, the Federal Lands Highway Program. This statute authorizes road construction on several different types of federal lands, specifically; forest highways, public lands highways, park roads, parkways and Indian reservation roads, as defined in 23 U.S.C. Section 101. Because these roads were also located on an Indian reservation, the regulations found at 25 C.F.R. Sections 170.1 through 170.19 also applied.

6. The first issue raised by Blaze concerns the tax rate applicable to Blaze's receipts from performing the construction services on the contracts at issue. Laws 1986, Chapter 20, Section 63 raised the gross receipts tax rate from 3¾ to 4¾ percent effective July 1, 1986. Concurrently, the legislature enacted Section 7-9-4.1 NMSA 1978 which is a temporary provision which allows a credit in the amount of the increased taxes for a taxpayer who becomes liable for additional tax because of the rate increase. The credit applies on the taxpayer's receipts from a fixed fee or unit price construction contract with a federal agency or instrumentality which was entered into prior to July 1, 1986. However, in order to claim the credit, the contractor needed to give the Department notice of intent to claim the credit within 120 days from July 1, 1986, pursuant to G.R. Regulation 4.1:2. The Taxpayer presented no evidence that it had done so in this case, and therefore, the Taxpayer is not eligible for a reduction in the gross receipts tax rate applied under the Department's assessment.

7. The second issue concerns whether Blaze can be considered an "Indian" for purposes of application of the doctrine expressed in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 64 (1973), that states lack the authority to tax the activities of Indians occurring on Indian reservations. As noted earlier, the Taxpayer is a corporation which is wholly-owned by Bill Aubrey, a Blackfeet Indian. In *Eastern Navajo Industries v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805 (Ct. App.

1978), the New Mexico courts addressed whether an Indian-owned corporation is afforded the same immunity from state taxation as an Indian would be for its activities occurring on an Indian reservation. The Court of Appeals granted the same tax immunity to the corporation which would have been granted to an Indian individual. In *Fox v. Bureau of Revenue*, 87 N.M. 261, 531 P.2d 1234 (Ct. App. 1975), *cert denied*, 88 N.M. 318, 540 P.2d 248 (1975), U.S. *cert. denied*, 424 U.S. 933 (1976), the New Mexico Court of Appeals ruled that New Mexico could not impose an income tax upon a Comanche Indian's income earned upon the Navajo Reservation. Thus, under New Mexico precedent, neither a taxpayer's status as a corporation, or its status as a member of an Indian tribe other than the tribe upon whose reservation the activity taxed occurs negates the immunity from state taxation conferred under the principles of the *McClanahan* case. Subsequent to the *Eastern Navajo Industries* and *Fox* decisions, however, the United States Supreme Court addressed the issue of membership status as affecting tax immunity in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). In that case, the Supreme Court ruled that nonmember Indians resident on the reservation but not enrolled in the governing tribe were taxable to the same extent as non-Indians. Thus, enrolled status in the tribe upon whose reservation the taxed activity occurs is required before the tax immunity principles of the *McClanahan* case become applicable. In this instance, since Blaze is owned by a Blackfeet Indian and the activities being taxed were performed upon Indian reservations other than the Blackfeet Reservation, Blaze is not an Indian for purposes of the application of the Indian tax immunity doctrine expressed in *McClanahan*.

8. Blaze next contends that New Mexico's attempt to tax its road construction activities on Indian reservations in New Mexico is preempted by federal law. Specifically, Blaze relies upon *White Mountain Apache Tribe v.*

Bracker, 498 U.S. 136 (1980) and *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) in support of its position that the taxes at issue are preempted. In *White Mountain*, the Court ruled that Arizona's attempt to tax a non-Indian company which had contracted with a tribal logging enterprise to sell, load and transport timber on an Indian reservation was preempted because the tax interfered with the federal government's comprehensive regulation of the harvesting and sale of tribal timber. In *Ramah*, the Supreme Court struck down New Mexico's attempt to impose its gross receipts tax on a non-Indian contractor building a school upon the Navajo Reservation on the basis that the tax interfered with the comprehensive federal scheme to provide for Indian education.

9. The Department contends that the special Indian preemption doctrine as embodied in the *White Mountain* and *Ramah* decisions is inapplicable to the instant case because in this case, the Department is only attempting to tax the Taxpayer's receipts from performing a contract with the federal government, in this instance, the Bureau of Indian Affairs. The Department relies upon *United States v. New Mexico*, 455 U.S. 720 (1982). That case stands for the proposition that the federal government's immunity from state taxation does not shield it from the economic burden of nondiscriminatory state taxes applied to its contractors unless the intention to preempt the taxes has been made explicit in federal legislation. A review of the cases applying the Indian preemption doctrine reveals that in all cases, the taxpayer was contracting with or receiving income directly from an Indian tribe or a tribal entity. Thus, none of the cases presented the exact question presented here. In this instance, the road construction at issue was performed pursuant to Federal Lands Highway Program, 23 U.S.C. Section 204. 23 U.S.C., Section 204(a) states:

> Recognizing the need for all federal roads which are public roads to be treated under the same uniform

> policies as roads which are on the federal-aid systems, there is established a coordinated federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways and Indian reservation roads as defined in Section 101 of this title.

A reading of the above makes it clear that this is a general federal program to provide for the construction and improvement of roads upon all federal lands, be they forests, parks or Indian reservations. Under current intergovernmental tax immunity doctrine, as expressed in *U.S. v. New Mexico* and *South Carolina v. Baker,* 485 U.S. —— 108 S.Ct. 1355 (1988), New Mexico could tax private parties with whom the United States contracts even though the financial burden of the tax falls upon the United States. There is no logical reason to treat the Taxpayer's receipts in this instance any differently solely because the work was performed on an Indian reservation. The fact remains that this was a contract with the United States, and the financial burden of these taxes will fall only upon the United States. In this regard, it is noteworthy that, although under 25 C.F.R. Section 170.6(a) the Commissioner of Indian Affairs may seek contribution from tribal funds for the road construction, there was no evidence presented in this case that any tribal funds comprised any part of the contract monies received by the Taxpayer. It is also significant that the roads constructed under this program are federal and not tribal roads. The construction of these roads is under the general supervision of the Secretary of Transportation, 25 C.F.R. Section 170.4. The roads are maintained by the Commissioner of Indian Affairs, 25 C.F.R. Section 170.6. Finally, the roads are required to be open to free public use, 25 C.F.R. Section 170.8. Thus, in order to be eligible for federal funds for construction of these roads, the tribes must waive an aspect of their sovereignty, the right to exclude non-members from their territory. Since only federal monies are impacted, the activity being taxed is actively being performed for the federal government,

and the roads are federal and not tribal roads, the intergovernmental tax immunity doctrine expressed in *U.S. v. New Mexico* is the doctrine which is applicable to this case. Under that test, the Taxpayer is subject to New Mexico's nondiscriminatory tax upon its receipts from performing services for the federal government.

10. Even should the special federal preemption test applied in *Ramah* and *White Mountain* apply in this case, New Mexico is not pretempted from applying its taxes upon Blaze's receipts. The special Indian preemption test was set out in the *White Mountain* case as follows:

> In such cases, we've examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal and tribal interest at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

White Mountain, 448 U.S. at 145-146. The most recent Supreme Court case applying the special Indian preemption doctrine was *Cotton Petroleum Corporation v. New Mexico*, 109 S. Ct. 1698 (1989). In that case, the Supreme Court addressed whether New Mexico's oil and gas severance taxes could be imposed upon non-Indian oil and gas producers whose operations were located on an Indian reservation. The Court concluded that neither the federal laws promoting tribal economic self-sufficiency, nor the federal laws governing Indian mineral leasing preempted the state tax at issue. Although the Court in *Cotton* did not depart from its formulation of the federal preemption doctrine as expressed in *Ramah* and *White Mountain*, the Court's preemption analysis was more rigorous and more closely focused on determining congressional intent to preempt or not preempt state taxes

than the earlier cases. For example, the Court found no congressional intent to preempt state tax in the Indian Reorganization Act, 25 U.S.C. Section 461, *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. Section 450, *et seq.*, or the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. Section 450, *et seq.*, even though those statutes "evidence to varying degrees a congressional concern with fostering tribal self-government and economic development." 109 S. Ct. at 1711, n. 14. Thus, even though in this case each road construction project was bid out pursuant to the Indian Financing Act of 1974, that act provides no basis for a finding of federal preemption from state taxes.

11. An examination of the statutes under which these road construction contracts were issued, the Federal Lands Highway Program, 23 U.S.C. Section 204, reveals no federal intention to preempt nondiscriminatory state taxes. As previously stated, 23 U.S.C. Section 204(a), quoted at paragraph 9, *supra*, makes it clear that under the act, the federal government recognized the need for federal roads on federal lands to be treated under the same uniform policies as roads which are part of the federal aid system. To satisfy this need, Congress established a coordinated federal lands highways program consisting of forest highways, public lands highways, park roads, parkways and Indian reservation roads. Subsection (a) of 23 U.S.C. Section 204 was enacted by Public Law 97-424, January 6, 1983. The former provision which specifically referred to Indian reservation roads, 23 U.S.C. Section 208, was repealed by the same act, lending further credence to the fact that Indian reservation roads were to be treated under the same uniform policies as other federal roads on federal lands. The legislative history of Public Law 97-424 further supports the conclusion that all federal lands highways, be they on an Indian reservation or not, are to be treated alike under the Federal Lands Highway Program. The conference committee report to the 1983 amendments emphasized that in both the house and senate bills, the

"Secretary of Transportation is made responsible for oversight and coordinating the federal lands highways in order to ensure that such highways are treated under the same uniform policies." 1982 U.S. Code Congressional and Administrative News, 3709-3710.

Only a few differences exist in the administration of Indian reservation roads from other federal land roads, as demonstrated by 23 U.S.C. Section 204. While forest highways and public lands highways are administered by the secretary of transportation, park roads, parkways and Indian reservation roads are administered by either the Secretary of Transportation or the Secretary of the Interior. For Indian reservation roads, Indian labor may be employed and no ceiling on federal employment applies. Additionally, the Buy Indian Act and provisions of Section 7(B) of the Indian Self-Determination and Education Assistance Act apply to funds appropriated for Indian reservation roads to permit preferential hiring of Indians. As was noted earlier, however, the Court in *Cotton* found no congressional intention to preempt state taxation in the Indian Self-Determination and Education Assistance Act of 1975. In any event, nothing in these provisions concerning the administration of Indian roads evidences any congressional intention to treat Indian roads differently than other federal lands roads for state tax purposes.

12. The regulations found at 25 C.F.R. Section 170, *et seq.*, which apply to these Indian reservation road construction projects also do not evidence a comprehensive federal scheme which would support a finding of congressional intention to preempt state authority to tax. Rather than evidencing a comprehensive federal scheme concerning Indian roads which excludes states entirely, 24 C.F.R. Section 170.7 allows the commissioner to enter into cooperative agreements with the states for the construction and maintenance of Indian reservation roads, especially where those road projects serve non-Indian land as well as Indian land. Although the regulations allow

tribal authorities to establish annual priorities for road construction projects (25 C.F.R. Section 170.4a), provide for obtaining tribal grants of right of way (25 C.F.R. Section 170.5), provide for Indian employment and contracts with Indian-owned construction companies (25 C.F.R. Section 170.5a) and allow the Commissioner to solicit tribal funding (25 C.F.R. Section 170.6a), these provisions go no farther than the statutes under which they're promulgated, the Federal Lands Highway Program, in evidencing a congressional intent to preempt these state taxes.

13. There was considerable discussion at the hearing concerning Blaze's attempt to prove that the imposition of the taxes at issue would burden the tribes in that fewer miles of roads could be constructed if the taxes were imposed. The record on this was speculative, at best. Neither Mr. Aubrey nor Mr. Woods could testify concerning whether or not the Bureau of Indian Affairs allowed for the imposition of state taxes in arriving at their engineer's estimate as to the allowable cost of the projects. Apparently, the Bureau of Indian Affairs provided no guidance to potential bidders concerning the applicability of state taxes. This is not remarkable considering the fact that for other road construction projects administered by the Secretary of Interior on park roads and parkways, the state would be entitled to impose its taxes on the contractors under *U.S. v. New Mexico.* The imposition of state taxes on private contractors constructing roads under the Federal Lands Highway Program on all roads which are not reservation roads does impose some degree of financial burden on the federal government's construction program, but this financial burden is permissible under the status of the law concerning intergovernmental tax immunity, and there is simply nothing in the Federal Lands Highway Program to indicate that different results should attach if the particular roads being constructed are Indian roads. It should be emphasized

that this is not a case such as *Ramah* or *White Mountain* where the state tax results in a direct financial burden being imposed upon a tribal entity. In this case, the tribes made no financial contribution to these road projects. This tax falls only upon the federal government. Additionally, as discussed in paragraph 9, *supra,* the Federal Lands Highway Program, 23 U.S.C. Section 204 and the regulations governing Indian reservation roads under that program, 25 C.F.R. Section 170 *et seq.,* make it clear that the roads in issue are federal and not tribal roads. Thus, there has been no showing of impairment of a tribal interest and the federal interest is impaired no more than under any other road construction contract administered under the Federal Lands Highway Program. Although the Department failed to present evidence concerning the state's interest in taxing Blaze's activities, in the absence of an impermissible impairment of the tribal and federal interests, and in the absence of anything evidencing a congressional intent to preempt the state tax, the tax is not preempted. As stated by the Court in *Cotton,* "to find preemption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factors such as those present in *Bracker* and *Ramah Navajo School Board* would be to return to the pre-1937 doctrine of intergovernmental tax immunity. . . . Absent more explicit guidance from Congress, we decline to return to this long discarded and thoroughly repudiated doctrine." 109 S. Ct. at 1713.

13. For the foregoing reasons, the Taxpayer's protest is denied.

Done this 23rd day of January, 1990, in Santa Fe, New Mexico.

/s/ Gerald B. Richardson
GERALD B. RICHARDSON
Hearing Officer
Taxation and Revenue Department

/s/ Gail Reese
GAIL REESE
Secretary
Taxation and Revenue Department

APPENDIX E

STATUTES INVOLVED

1. The New Mexico Gross Receipts and Compensating Tax Act, Ch. 7, Article 9 NMSA 1978 (Supp.), provides in pertinent part:

7-9-2. Purpose.

The purpose of the Gross Receipts and Compensating Tax Act [this article] is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico and to protect New Mexico businessmen from the unfair competition that would otherwise result from the importation into the state of property without payment of a similar tax.

7-9-4. Imposition and rate of tax; denomination as "gross receipts tax."

A. For the privilege of engaging in business, an excise tax equal to five percent [x] of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the "gross receipts tax."

7-9-7. Imposition and rate of tax; denomination as "compensating tax."

A. For the privilege of using tangible property in New Mexico, there is imposed on the person using the property an excise tax equal to five percent [y] of the value of tangible property that was:

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[x] The rate of five percent was substituted for a prior rate of four and three-fourths percent by N.M. 1st S.S. Ch. 1, § 2.

[y] See n. ——, supra.

(1) manufactured by the person using the property in the state;

(2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state; or

(3) acquired as the result of a transaction which was not initially subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax.

For the purpose of this subsection, value of tangible property shall be determined as of the time of acquisition or introduction into this state or of conversion to use, whichever is later.

B. For the privilege of using services rendered in New Mexico, there is imposed on the person using such services an excise tax equal to five percent of the value of the services at the time they were rendered. The services, to be taxable under this subsection, must have been rendered as the result of a transaction which was not initially subject to the gross receipts tax but which transaction, because of the buyer's subsequent use of the services, should have been subject to the gross receipts tax.

C. The tax imposed by this section shall be referred to as the "compensating tax."

7-9-9. Liability of user for payment of compensating tax.

Any person in New Mexico using property on the value of which compensating tax is payable but has not

been paid is liable to the state for payment of the compensating tax, but this liability is discharged if the buyer has paid the compensating tax to the seller for payment over to the department.

2. *The Indian Self-Determination and Education Assistance Act, P.L. 93-638, approved January 4, 1975, 88 Stat. 2203, as amended, provides:*

25 U.S.C. § 450a Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

25 U.S.C. § 450f Contracts by Secretary of the Interior with tribal organizations

(a)(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596) [25 USCS §§ 452 et seq.], as amended;

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674) [42 USCS §§ 2001 et seq.], as amended;

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days

ater receipt of the proposal, approve the proposal unless, within sixty days of receipt of the proposal, a specific finding is made that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured; or

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(b) whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the organization to overcome the stated objections, and

(3) provide the organization with a hearing on the record and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate.

(c)(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative

agreements pursuant to this Act. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451 et seq.), except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

25 U.S.C. § 450n Sovereign immunity and trusteeship rights unaffected

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

(Jan. 4, 1975, P. L. 93-638, Title I, § 110, 88 Stat. 2213.)

3. Section 124(b) of the Surface Transportation Act of 1982, P.L. 97-424. approved January 6, 1983, 96 Stat. 2097, 2114, 23 U.S.C. § 204 provides:

§ 204. Federal Lands Highways Program [lands highways program]

(a) Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian reservation roads as defined in section 101 of this title [23 USCS § 101].

(b) Funds available for forest highways and public lands highways shall be used by the Secretary to pay for the cost of construction and improvement thereof. Funds available for park roads, parkways, and Indian reservation roads shall be used by the Secretary of the Interior to pay for the cost of construction and improvement thereof. In connection therewith, the Secretary and the Secretary of the Interior, as appropriate, may enter into construction contracts and such other contracts with a State or civil sub-

division thereof or Indian tribe as deemed advisable. In the case of Indian reservation roads, Indian labor may be employed in such construction and improvement under such rules and regulations as may be prescribed by the Secretary of the Interior. No ceiling on Federal employment shall be applicable to construction or improvement of Indian reservation roads.

(c) Before approving as a project on an Indian reservation road any project on a Federal-aid system in a State, the Secretary must determine that the obligation of funds for such project is supplementary to and not in lieu of the obligation, for projects on Indian reservation roads, of a fair and equitable share of funds apportioned to such State under section 104 of this title [23 USCS § 104].

(d) Cooperation of States, counties, or other local subdivisions may be accepted in construction and improvement, and any funds received from a State, county, or local subdivision shall be credited to appropriations available for the class of Federal lands highways to which such funds were contributed.

(e) Construction of each project shall be performed by contract awarded by competitive bidding, unless the Secretary or the Secretary of the Interior shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest. Notwithstanding the foregoing, the provisions of section 23 of the "Buy Indian" Act of June 25, 1910 (36 Stat. 891) [25 USCS § 47], and the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2205) [25 USCS §450e(b)] shall apply to all funds administered by the Secretary of the Interior which are appropriated for the construction and improvement of Indian reservation roads.

(f) All appropriations for the construction and improvement of each class of Federal lands highways shall be administered in conformity with regulations and agreements jointly approved by the Secretary and the Secretary of the appropriate Federal land managing agency.

APPENDIX F

REGULATIONS INVOLVED

1. *Part 170—Roads of the Bureau of Indian Affairs—of Title 25 of the Code of Federal Regulations provides in pertinent part:*

§ 170.3 Construction and improvement.

Subject to the availability of appropriations for Indian reservation roads and bridges and any other contribution of State or Indian tribal lands, the Commissioner shall plan, survey, design and construct roads on the Federal-Aid Indian Road System to provide an adequate system of road facilities serving Indian lands.

§ 170.4 Approval of road construction activities.

The Secretary of Transportation or his authorized representative shall approve the location, type, and design of all projects on the Federal-Aid Indian Road System before any construction expenditures are made. All such construction shall be under the general supervision of the Secretary of Transportation or his authorized representative.

(23 U.S.C. 208)

§ 170.4a Selection of road construction projects.

The Commissioner, who is responsible for the planning, surveys and design, shall keep the appropriate local tribal officials informed of all technical information relating to the project alternatives of proposed road developments. The Commissioner shall recommend to the tribe those proposed road projects having the greatest need as determined by the comprehensive transportation analysis. Tribes shall then establish annual priorities for road construction projects. Subject to the approval of the

Commissioner, the annual selection of road projects for construction shall be performed by tribes. Funds available for the construction of roads on the Federal-Aid Indian Road System shall not be used for the capital improvement to privately-owned property. (39 Stat. 355)

§ 170.5 Right-of-way.

(a) The procedure for obtaining permission to survey and for granting any necessary right-of-way are governed by part 169 of this chapter. Tribal consent as required under § 169.3(a) may be made by public dedication where proper tribal authority exists. Before any work is undertaken for the construction of road projects, the Commissioner shall obtain the written consent of the Indian landowners. Where an Indian has an interest in tribal land by virtue of a land use assignment, such consent shall be obtained from both the landholder of the assignment and the Indian tribe. Right-of-way easements are to be on a form approved by the Commissioner.

(b) If it appears that the road might be transfered to the tribe, the county or the State within 10 years, then before such construction is undertaken, right-of-way easements for the project shall be obtained in favor of the United States, its successors and assigns, with the right to construct, maintain, and repair improvements thereon and thereover, for such purposes and with the further right in the United States, its successors and assigns, to transfer the right-of-way easements by assignment, grant or otherwise.

§ 170.5a Employment of Indians.

The Bureau of Indian Affairs road program shall be administered in such a way as to provide training and employment of Indians. The Commissioner may contract with tribes and Indian-owned construction

companies, or the Commissioner may purchase materials, obtain equipment and employ Indian labor in the construction and maintenance of roads.

(36 Stat. 861; 78 Stat. 241, 253; 78 Stat. 257; 25 U.S.C. 47; 42 U.S.C. 2000e(b), 2000e-2(i); 23 U.S.C. 208(c))

§ 170.6 Maintenance of Indian roads.

The administration and maintenance of Indian reservation roads and bridges is basically a function of the local Government. Subject to the availability of funds, the Commissioner shall maintain, or cause to be maintained, those approved roads on the Federal-Aid Indian Road System. The Commissioner may also maintain roads not on the Federal-Aid Indian Road System if such roads meet the definition of "Indian reservation road and bridges" and are approved for maintenance by the Commissioner. No funds authorized under 23 U.S.C. 208 are available for the maintenance of roads.

§ 170.6a Contributions from tribes.

The Commissioner may enter into agreements with an Indian tribe for a contribution from its tribal funds for the construction or maintenance of roads governed by regulations of this part. However, the tribe must be able to make such contributions without undue impairment of the necessary tribal functions.

2. *Part 271—Contracts Under the Indian Self Determination Act of the Code of Federal Regulations provides in pertinent part:*

§ 271.4 Statement of policy.

(a) The Congress has recognized the obligation of the United States to respond to the strong expres-

sion of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibilities to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) It is the policy of the Bureau to facilitate the efforts of Indian tribes to plan, conduct, and administer programs, or portions thereof, which the Bureau is authorized to administer for the benefit of Indians and to facilitate the coordination of all Federal and other programs on Indian reservations.

(d) It is the policy of the Bureau to continually encourage Indian tribes to become increasingly knowledgeable about Bureau programs and the opportunities Indian tribes have regarding them; however, it is the policy of the Bureau to leave to Indian tribes the initiative in making requests for contracts and to regard self-determination as including the decision of an Indian tribe not to request contracts.

(e) It is the policy of the Bureau not to impose sanctions on Indian tribes with regard to contracting or not contracting; however, the special resources made available to facilitate the efforts of those Indian tribes which do wish to contract should be made known to all tribes, as should the current realities of funding and Federal personnel limitations.

(f) Contracting is one of several mechanisms by which Indian tribes can exercise their right to plan, conduct, and administer programs or portions thereof which the Secretary is authorized to administer for the benefit of Indians. Another mechanism afforded Indian tribes is the use of a grant, as provided in part 272 of this chapter, or other resources, to plan the manner in which it wishes the Bureau to operate a program or portion thereof.

(g) Contracting by its very nature places Bureau officials in the dual position of assisting Indian tribes, in many instances, by furnishing technical assistance in preparation of contract proposals, and of carrying out their fiscal and administrative responsibilities as officials of the Federal Government. It is recognized that very often these two positions are in opposition to each other. The Act and these regulations are designed to address this problem to the degree practicable. The Commissioner, Area Directors and Superintendents, as line officers of the Bureau, are expected to balance these two positions within the framework of the regulations in this part.

(h) The regulations in this part are not meant to and do not change the eligibility criteria which individuals must meet to be eligible for any program currently operated by the Bureau. The eligibility criteria for each Bureau program is given in the part of 25 CFR chapter I, which deals with that program. A contractor shall use the existing Bureau eligibilty criteria in operating all or parts of a Bureau program under a contract under this part unless a waiver is obtained from the Commissioner. The Commissioner may not waive eligibilty criteria established by statute. The Commissioner may waive eligibilty criteria established by regulation in 25 CFR chapter I.

Subpart B—Application Process

§ 271.11 Eligible applicants.

Any tribal organization is eligible to apply for a contract or contracts with the Bureau to plan, conduct, and administer all or parts of Bureau programs under section 102 of the Act. However, before the Bureau can enter into a contract with a tribal organization, it must be requested to do so by the Indian tribe or tribes to be served by the contract in accordance with § 271.18.

§ 271.12 Contractable Bureau programs.

(a) Tribal organizations are entitled to contract with the Bureau to plan, conduct, and administer all or parts of any program which the Bureau is authorized to administer for the benefit of Indians. All or parts of any program include:

(1) Any part of a Bureau program which is divisible from the remainder of the program so long as the contract does not significantly reduce benefits to Indians served by the non-contracted part(s) of the program. However, to the extent that it is within the Bureau's existing authority and the program or part thereof involves only one tribe and one Bureau Agency or Area Office, the benefits provided to Indians by the non-contracted part(s) of the program may be reduced at the request of the tribe. When the program or part thereof serves more than one tribe, the benefits provided by the noncontracted part(s) of the program may be reduced when all of the tribes served consent to a reduction.